

<b>Newton v Jamaica Hosp.</b>
2014 NY Slip Op 33800(U)
September 30, 2014
Supreme Court, Queens County
Docket Number: 17587/2013
Judge: Robert J. McDonald
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17587/2013 ORDER SIGNED

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QUEENS COUNTY

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

**ORIGINAL**

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PATRICIA NEWTON,

Index No.: 17587/2013

Plaintiff,

Motion Date: 07/14/14

- against -

Motion No.: 76 and 77

THE JAMAICA HOSPITAL, OTIS ELEVATOR  
COMPANY, THYSSENKRUPP ELEVATOR  
CORPORATION and NOUVEAU ELEVATOR  
INDUSTRIES, INC.,

Motion Seq.: 1 and 2

Defendants.

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The following papers numbered 1 to 35 were read on the motion by defendant, THYSSENKRUPP ELEVATOR CORPORATION (TKE), and the separate motion of defendant, OTIS ELEVATOR COMPANY, both for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant dismissing the plaintiff's supplemental summons and amended complaint and all cross-claims on the ground that TKE and OTIS are not liable to the plaintiff for damages:

Papers  
Numbered

TKE's Notice of Motion-Affirmation-Exhibits-Memo of Law..	1 - 5
Otis's Notice of Motion-Affirmation-Exhibits.....	6 - 10
Plaintiff Newton's Affirmation in Opposition.....	11 - 14
Jamaica Hospital Affirmations in Opposition(2).....	15 - 21
Nouveau's Affirmations in Opposition(2).....	22 - 25
TKE's Affirmations in Reply-Memorandum of Law(2).....	26 - 29
Otis's Affirmations in Reply(3).....	30 - 35

This is a negligence action in which the plaintiff seeks damages for personal injuries she allegedly sustained in an elevator accident which took place on November 4, 2011 in premises owned by Jamaica Hospital. The plaintiff commenced the instant action against the Jamaica Hospital and Otis Elevator Company, by filing a summons and complaint on September 19, 2013. On January 24, 2014, the plaintiff filed a supplemental summons and amended complaint adding defendants Thyssenkrupp Elevator Corporation and Nouveau Elevator Industries, Inc. (Nouveau).

The gravamen of the complaint is that on November 4, 2011, the plaintiff was a passenger inside one of the elevators located the Trump Pavilion Building of Jamaica Hospital, located at 8900 Van Wyck Expressway Jamaica, New York. The Trump Pavilion houses a Nursing Home on the Jamaica Hospital premises. The complaint asserts that plaintiff was attempting to exit the elevator on the basement level when the elevator "suddenly and without warning moved, jerked, bounced up and down ascended and or/descended thereby causing the plaintiff to be ejected and/or thrown from said elevator and to be violently precipitated to the ground." The complaint states that as a result of the accident, the plaintiff sustained severe, serious, and permanent injuries. The complaint asserts that the defendants had actual and constructive knowledge of the unsafe condition and failed to remedy and repair the elevator within a reasonable time.

Defendant TKE, an elevator company, now moves, prior to depositions, for an order dismissing the complaint against it for failure to state a cause of action pursuant to CPLR 3211(a)(1) and (7) or for summary judgment dismissing the plaintiff's complaint and all cross-claims against it on the ground that TKE, did not own or manage the premises where the accident occurred and did not maintain, supervise, operate, inspect or repair the elevator in question. TKE asserts that although it did install hydraulic elevators on the premises in March 2009 and performed new installation services for one year thereafter, expiring on April 16, 2010, TKE asserts that it did not have a further contract to maintain, service or repair any elevators in the Trump Pavilion premises and performed no work in that premises at any time since April 16, 2010. Counsel for TKE, John T. McNamara, Esq. contends that as TKE performed no work on the subject elevator for nineteen months prior to the accident, it had no role with respect to the incident in question and owed no duty to the plaintiff and as such there is no basis for the plaintiff's allegations against TKE (citing Fernandez v Otis Elevator Co., 4 AD3d 69 [1<sup>st</sup> Dept. 2009]; Proctor v Rensselaer Polytechnic Inst., 277 AD2d 536 [3<sup>rd</sup> Dept. 2000]). Counsel asserts that it is his belief that defendant, Nouveau Elevator Company was responsible for maintaining and servicing the elevators at the premises in issue commencing in April 2010.

In support of the motion, TKE submits an affidavit from Daniel Fowler, Service Supervisor with TKE, dated March 20, 2014. Mr. Fowler states that based upon his personal knowledge, TKE contracted with Jamaica Hospital to furnish and install four hydraulic elevators at the nursing home in the Trump Pavilion. The elevators were approved by the NYC Dept of Buildings in March

and April 2009. He states that following the acceptance of the elevators, TKE performed new installation services for a period of one year, expiring on April 16, 2010. He states that since that time, TKE has had no contract with Jamaica Hospital pertaining to the maintenance of the elevators at Trump Pavilion and has performed no work on the subject elevators since March 2010.

Defendant Otis, by counsel Diane R. Silvergleid, Esq. also moves for an order dismissing the plaintiff's supplemental summons and amended complaint on the ground that their investigation shows that Otis did not install and was never responsible for maintaining or otherwise servicing any elevators at the Trump Pavilion. In support of the motion, Otis submits the affidavit of Frank Wilhemy, service manager for Otis Elevator Company. He states that from his personal knowledge and his review of the Otis business records, Otis did not install any elevators in the Trump Pavilion and Otis has never had a service contract to perform elevator maintenance, repair or service work in any of the elevators in the Trump Pavilion nor has Otis performed any service on a one-time basis. Therefore, Otis contends that the plaintiff's complaint must be dismissed against it as it had no duty to the plaintiff and cannot be liable for any injuries sustained by the plaintiff.

In opposition, counsel for the plaintiff, Patricia Newton, Michael M. Szechter, Esq., states that the motion is premature in that the moving defendants have failed to provide any discovery regarding the premises in question, including any contracts, maintenance, inspection or safety related records. Counsel states the neither moving defendant has responded to the plaintiff's notice for discovery and inspection dated May 21, 2014 that called for the production of work orders, maintenance records, inspection reports, incident reports, and other essential documents. In addition, plaintiff states that no depositions have been taken as yet. Counsel states that pursuant to CPLR 3212(f), the plaintiff is not able to respond to the pending motions for summary judgment as facts essential to justify opposition cannot be stated at this time without depositions and disclosure of documents. Plaintiff states that she has not had adequate opportunity to conduct discovery into several relevant issues, certain of which, it is contended, are exclusively within the knowledge of the defendants (citing Juseinoski v. New York Hosp. Med. Ctr. of Queens, 29 AD3d 636 [2d Dept. 2006]). Plaintiff states that Otis acknowledged in correspondence that it had a contract with the property owner Jamaica Hospital but has not produced said document. Rather, it is argued, Otis merely produced a cursory and self-serving affidavit from its employee.

Counsel states that the defendants have failed to produce any inspection records or other evidence sufficient to eliminate all issues of fact as to whether its actions, during the term of its contract, did not cause or contribute to the incident in which the plaintiff was injured. As to TKE, plaintiff asserts that said defendant performed installation and maintenance service in Trump Pavilion but has not provided any documents with regard to whether during the term of their contract they may have performed services which could have contributed to the plaintiff's accident.

Co-defendant, Jamaica Hospital, by counsel Louise Fasano, Esq., submits an affirmation opposing the motions for summary judgment on the ground that there are questions of fact with regard to which elevator car the alleged accident occurred in and which entity or entities was responsible for servicing and maintaining the particular elevator car where the accident is alleged to have occurred. Jamaica Hospital agrees with the plaintiff that the motions are premature because the defendants have not had an adequate opportunity to conduct discovery and facts essential to justify opposition to the instant motions may be revealed through pretrial discovery (citing Dietrich v Grandsire, 83 AD3d 994 [2d Dept. 2011]). In the instant matter, counsel asserts that a deposition of the plaintiff is necessary to determine which elevator was involved in the accident given that the complaint alleges two locations separate and apart from each other in Jamaica Hospital. Counsel asserts that without a bill of particulars from the plaintiff and her deposition regarding which elevator car was involved in the accident, the Hospital cannot address the appropriate contract and maintenance records for the elevator in question. Further, the Hospital asserts there are four elevators in the Trump Pavilion, none of which has been identified. Thus, counsel asserts that as the specific location of the accident has yet to be ascertained, it is premature for any motion for summary judgment to be decided without further discovery. Further, counsel contends that without EBTs there are open issues as to whether the accident occurred as the result of the installation or maintenance of the elevator in question.

Nouveau, by counsel Justin J. Skvarce, Esq., also opposes the instant motions for summary judgment on the ground that they are premature and that there are questions of fact as to defendants' negligence as plaintiff has yet to identify the specific elevator in question. Further, counsel asserts that TKE and Otis have yet to respond to Nouveau's discovery demands and have not yet appeared for depositions. Counsel contends that without identifying the building or the elevator in question that

the defendants cannot make a prima facie showing of entitlement to judgment as a matter of law, especially as TKE was involved in the installation and service of certain elevators on the premises and Otis as well had service contracts for certain elevators at Jamaica Hospital.

Counsel for Nouveau Elevator also opposes the motions on the ground that Nouveau has not had an opportunity to conduct discovery and there is a question of fact as to the defendants potential negligence as plaintiff has yet to identify the specific elevator in question. Counsel asserts that TKE has not been produced for a deposition and has failed to respond to the discovery demands of Nouveau. Nouveau alleges that the motion is premature as plaintiff's complaint does not specify which elevator within the Jamaica Hospital Medical Center was involved in the accident. Further, counsel asserts that TKE has not produced sufficient evidence to support its assertion that it only serviced the elevators until April 2010.

Otis Elevator (Otis), also moves for an order pursuant to CPLR 3212 dismissing the plaintiff's supplemental summons and amended complaint on the ground that it has investigated the matter and finds that it did not install and was never responsible for maintaining or otherwise servicing any elevators at the Trump Pavilion. In support of its application, counsel submits the affirmation of Otis Service Manager, Frank Wilhelmy, who states that from his personal knowledge Otis did not install any of the elevators at the Trump Pavilion and has never had a contract to provide elevator services of any kind at the Trump Pavilion and has not done any work on any elevator at the Trump Pavilion on a one time basis. Accordingly, Otis contends that the complaint must be dismissed as it has had absolutely no contact with any elevators in question and therefore cannot be held liable for damages to the plaintiff.

Upon review and consideration of the defendants' motions, the affirmations in opposition, and defendants' reply thereto, this court finds that the respective motions of Otis and TKE to dismiss plaintiff's complaint and all cross-claims against them are denied without prejudice to renew following the completion of discovery. Here, the plaintiff and co-defendants raised material questions regarding TKE's and Otis's responsibility for installing and maintaining the elevators. Moreover, the plaintiff has not yet supplied a bill of particulars nor been deposed and there is a question as to which specific elevator was involved in the accident. Thus, this Court finds that the deposition of plaintiff and defendants are necessary for plaintiff and co-defendants to obtain evidence that may be relevant and facts

17587/2013 ORDER SIGNED

necessary to justify opposition to the motion as to which elevator was involved and whether the accident was due to its installation and/or maintenance (see CPLR 3212[f]; Sepulveda v Cammeby's Mgt. Co., LLC, 119 AD3d 927 [2d Dept. 2014]; Malester v Rampil, 118 AD3d 855 [2d Dept. 2014]; Bank of Am., N.A. v Hillside Cycles, Inc., 89 AD3d 653 [2d Dept. 2011][a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]; Bond v DeMasco, 84 AD3d 1292 [2d Dept. 2011]; Dietrich v Grandsire, 83 AD3d 994 [2d Dept. 2011]; Botros v Flamm, 77 AD3d 602 [2d Dept. 2010]).

Dated: September 30, 2014  
 Long Island City, N.Y.

**FILED**

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 J.S.C.

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